

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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### Legend

|              |   |
|--------------|---|
| Taxpayer     | = |
| Parent       | = |
| Year 1       | = |
| Year 2       | = |
| Tax Preparer | = |

Dear :

This responds to your letter dated March 15, 2012 submitted by your authorized representatives, requesting an extension of time under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations, for Taxpayer to make an election under § 198 of the Internal Revenue Code to deduct qualified environmental remediation expenditures (QER expenditures) for Year 1 and Year 2.

### FACTS

Taxpayer is a wholly owned subsidiary of Parent. However, during the taxable years at issue, Taxpayer was the common parent of its own consolidated group.

Taxpayer is responsible for a share of the costs necessary for environmental remediation of a parcel of land. Taxpayer incurred and deducted QER expenditures during Year 1 and Year 2.

It was Taxpayer's intent, understanding, and expectation that Tax Preparer would follow all applicable procedures to deduct the QER expenditures. Tax Preparer prepared Taxpayer's federal income tax returns for Year 1 and Year 2. Tax Preparer included the proper amounts on the line for "Other Deductions" on Taxpayer's Forms

1120, U.S. Corporation Income Tax Return, for Year 1 and Year 2. Tax Preparer attached the schedule required by Rev. Proc. 98-47, 1998-2 C.B. 319, to the Forms 1120 and labeled all environmental expense deductions as “environmental.” However, on both schedules, Tax Preparer did not write “Section 198 Election” on the line on which the QER expenditures separately appear.

Taxpayer’s personnel did not identify the error when they reviewed the federal income tax returns because the requirements to make the election were outside their knowledge and expertise. It is represented that Taxpayer’s personnel relied on Tax Preparer to accurately prepare Taxpayer’s returns and were not aware of the inadvertent error at the time the Year 1 return were filed.

Taxpayer represents that the expenditures for which it requests relief meet all of the requirements of § 198, including the § 198(c) statement designating the site as a qualified contaminated site. Taxpayer further represents the expenditures for Year 1 and Year 2 do not relate to expenditures made for depreciable property as described in § 198(b)(2).

Taxpayer’s federal income tax returns for Year 1 and Year 2 are currently under examination by the Internal Revenue Service. Tax Preparer’s omission of the correct label was discovered during the examination. As a result, Taxpayer seeks an extension of time to perfect Section 198 Election for Year 1 and Year 2.

### LAW & ANALYSIS

Section 198 of the Code provides, in part, that a taxpayer may elect to treat any QER expenditure which is paid or incurred by the taxpayer as an expense which is not chargeable to capital account. Any expenditure which is so treated shall be allowed as a deduction for the taxable year in which it is paid or incurred.

Under § 198(b), a “qualified environmental remediation expenditure” means any expenditure which is otherwise chargeable to capital account and which is paid in connection with the abatement or control of hazardous substances at a qualified contaminated site.

Rev. Proc. 98-47 provides the procedures for taxpayers to make the election under § 198 to deduct any QER expenditure. Under section 3.01 of Rev. Proc. 98-47, the election must be made on or before the due date (including extensions) for filing the income tax return for the taxable year in which the QER expenditures are paid or incurred. In addition, persons other than individuals are required to make the election by including the total amount of § 198 expenses on the line for “Other Deductions” on their appropriate federal tax return. On a schedule attached to the return that separately identifies each expense included in “Other Deductions,” the taxpayer must write “Section 198 Election” on the line on which the § 198 expense amounts separately appear. See section 3.02(2) of Rev. Proc. 98-47.

Section 3.03 of Rev. Proc. 98-47 provides that, if for any taxable year, the taxpayer pays or incurs more than one QER expenditure, the taxpayer may make a § 198 election for any one or more of such expenditures for that year. Thus, the taxpayer may make a § 198 election with respect to a QER expenditure even though the taxpayer chooses to capitalize other such expenditures (whether or not they are of the same type or paid or incurred with respect to the same qualified contaminated site). Further, a § 198 election for one year has no effect for other years. Thus, a taxpayer must make a § 198 election for each year in which the taxpayer intends to deduct QER expenditures.

Section 301.9100-3 of the Regulations generally provides extensions of time for making regulatory elections. For this purpose, § 301.9100-1(b) defines the term “regulatory election” to mean an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in § 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) states that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer -

- (i) requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Internal Revenue Service; or
- (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

A taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not competent to render advice on the regulatory election or aware of all relevant facts. Section 301.9100-3(b)(2).

Under § 301.9100-3(b)(3), a taxpayer is deemed to have not acted reasonably or in good faith if the taxpayer -

(i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3) of the Income Tax Regulations) and the new position requires or permits a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the Internal Revenue Service will not ordinarily grant relief. In such a case, the Internal Revenue Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides, in part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under § 301.9100-3.

Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time relief is requested. Furthermore, Taxpayer is not using hindsight in requesting relief. Taxpayer has represented that specific facts have not changed since the original deadline that made the election appear advantageous.

Based on the facts represented, Taxpayer acted reasonably and in good faith. Taxpayer reasonably relied on a qualified tax professional to prepare its returns and such tax professional attempted to make the election, but inadvertently omitted the label necessary to perfect the election. In addition, the interests of the government are not prejudiced in this case. Taxpayer has represented that granting relief would not result

in a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made (taking into account the time value of money). Furthermore, the taxable years in which the regulatory election should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of assessment.

#### RULING

Based solely on the facts and the representations submitted, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 have been met. Accordingly, an extension of time is hereby granted for Taxpayer to perfect the election under § 198 to deduct QER expenditures for Year 1 and Year 2. In this regard, we will consider the § 198 elections for Year 1 and Year 2 to have been perfected, notwithstanding Tax Preparer's omission. A copy of this letter ruling should be associated with the Forms 1120.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed as to whether the expenditures discussed in this ruling constitute QER expenditures under § 198. This ruling simply extends the period of time in which Taxpayer may make an election under § 198.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Merrill D. Feldstein  
Senior Counsel, Branch 3  
(Income Tax & Accounting)

cc: